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In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANK M. REED, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly found that a portion of an instruction defining "explosive," as used in 18 U.S.C. 844, although erroneous, was harmless.

2. Whether the district court abused its discretion in quashing petitioner's subpoena duces tecum to the City of Anchorage and excising portions of the FBI case agent's investigative report.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-2q), prior to its amendment by order of May 1, 1984 (Pet. App. 2s), is reported at 726 F.2d 570.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1984. A petition for rehearing was denied on April 17, 1984 (Pet. App. 2r), and the court of appeals amended its opinion by order of May 1, 1984 (Pet. App. 2s). The petition for a writ of certiorari was filed on May 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner and a co-defendant were convicted of conspiring to destroy two

Anchorage bars with an explosive, in violation of 18 U.S.C. 371 and 844(i) (Count 1); attempting to destroy the bar "Bobby McGee's" with an explosive on October 1, 1979, in violation of 18 U.S.C. 844(i) and (j) (Count 2); aiding and abetting the destruction of "Bobby McGee's" with an explosive on October 15, 1979, in violation of 18 U.S.C. 844(i) and (j) (Count 3); and possession of an unregistered firearm on October 1, 1979, in violation of 26 U.S.C. 5861(d) and 5845(a)(8) and (f) (Count 5). Pet. App. 2b & n.1.[1] Petitioner was sentenced to concurrent terms of five years' imprisonment on Count 1 and eight years' imprisonment on each of Counts 2, 3 and 5.

1. The court of appeals summarized the evidence adduced at trial as follows (Pet. App. 2c):

> In August 1979, [petitioner] and Donal McDaniel discussed a plan to destroy Bobby McGee's, a restaurant operated by one of [petitioner's] business competitors. In mid-September 1979, McDaniel met with Jerry Green who agreed to burn McGee's for $15,000. Green then met with David Smith, who was to do the actual burning.
>
> On October 1, 1979, an unsuccessful attempt was made to destroy the building housing Bobby McGee's by fire. The apparent source of the fire was paper-wrapped, gasoline-filled beverage cans in the tops of which holes had been punctured. The cans had been placed around the exterior walls of the building and ignited. The damage was primarily to the exterior but some of the fire did burn through to the interior.
>
> On October 15, 1979, a second attempt to destroy the building succeeded. The Government charged that the destruction was accomplished by pouring gasoline

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[1] Petitioner and his co-defendant were acquitted of attempting to burn another Anchorage bar (Counts 4 and 6). Pet. App. 2b.

along the interior and exterior walls and floors of the building, and igniting it by a delay fuse.

2. On appeal, petitioner argued that the methods used to set the two fires did not constitute an "explosive" or "incendiary device" within the meaning of 18 U.S.C. 844(i) and (j). The court of appeals acknowledged (Pet. App. 2d) that, subsequent to petitioner's conviction, Congress amended Section 844(i) specifically to include arson "by means of fire" or explosive. Anti-Arson Act of Oct. 12, 1982, Pub. L. No. 97-298, 96 Stat. 1319. Nonetheless, since it read the law prevailing in the Ninth Circuit at the time of petitioner's conviction as not reaching a fire caused solely by gasoline poured on the floors and walls of a building and lighted with a delay fuse, the court of appeals reversed petitioner's conviction for the October 15th fire (Count 3) (Pet. App. 2f-2g). The court concluded, however, that the October 1st fire (Count 2) fell within the statutory definition because petitioner had attempted to burn the bar on that date by means of gasoline-filled cans that were "explosive devices" within the meaning of the statute (*id.* at 2d-2f).

The court of appeals also held (Pet. App. 2g-2h) that the district court did not commit reversible error in instructing the jury that "[a]n incendiary device is any article, substance or combination of articles or substances capable of generating fire in a combustible material." The court considered the instruction erroneous because, according to its reading of Ninth Circuit law prevailing at the time petitioner was tried, a fire started by gasoline alone did not fall within the definition of an "explosive." The court nevertheless deemed the error harmless because, in its view, there was no possibility that the instruction could have materially affected the jury's verdict concerning the October 1st fire. In addition to that portion of the instruction quoted above, the district court had instructed the jury that the "term 'explosive or

incendiary device' means incendiary bomb, grenade, fire bomb, or similar device." Hence, in the court's view, the jury most probably applied that part of the definition and on that basis found that the paper-wrapped gasoline-filled beverage cans used in the October 1st fire were "an explosive or incendiary device."

Finally, the court of appeals held that the district court did not abuse its discretion in quashing petitioner's subpoena to the City of Anchorage to compel production of investigative reports concerning other alleged instances of arson that occurred during the same time period as the fires at Bobby McGee's. The appellate court independently reviewed the documents and agreed with the trial court that the incidents described in the reports were different in nature from those involved in the present case. It further noted (Pet. App. 2j-2k) that petitioner had not demonstrated how the requested reports would be admissible under Fed. R. Evid. 803(8)(B). Likewise, the court of appeals independently reviewed and upheld the district court's excision of portions of the FBI case agent's investigative report that petitioner had requested under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. 3500.[2]

ARGUMENT

1. Petitioner first contends (Pet. 4-10) that the trial court's instruction permitting the jury to find that substances capable of generating a fire were "explosives" within the meaning of 18 U.S.C. 844 could not be harmless error.

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[2]The court of appeals also reversed petitioner's conviction for possession of an unregistered firearm (Count 5), on the ground that the paper-wrapped, gasoline-filled beverage cans, with holes punctured in the tops, which were used in the October 1st attempted fire, were not "destructive devices" within the meaning of 26 U.S.C. 5845(f). Pet. App. 2h-2j.

Relying on this Court's decision in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), petitioner argues that a failure correctly to define an element of the offense requires automatic reversal. Petitioner's argument lacks merit.

At the outset we note, as did the court of appeals (Pet. App. 2d), that 18 U.S.C. 844(i) has been amended so as to prohibit specifically the malicious damage or destruction or attempted damage or destruction of property used in interstate commerce "by means of *fire* or" an explosive. Anti-Arson Act of Oct. 12, 1982, Pub. L. No. 97-298, 96 Stat. 1319 (emphasis added). Hence, the question whether the jury was correctly instructed with respect to the meaning of an "explosive device" is of no continuing significance.

In any event, petitioner's reliance on *Connecticut* v. *Johnson, supra,* is misplaced. That case dealt with the question whether a specific instruction concerning intent — that the law presumes that a person intends the ordinary consequences of his voluntary acts — held unconstitutional in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), could ever be considered harmless error. In *Connecticut* v. *Johnson, supra,* a plurality of this Court held that a reviewing court could seldom find a *Sandstrom* error harmless because, since such an instruction could be construed by the jury as creating a conclusive presumption against the defendant on the question of intent, it amounts to the functional equivalent of a directed verdict on that issue. The Court found that the error in that case was not harmless because intent had been a contested issue, and because the effect of the challenged instruction therefore had been to permit the jury to convict without ever examining the evidence concerning one of the essential elements of the crimes charged.

By contrast, the court of appeals in this case concluded that there was no real possibility that the jury had been misled by the challenged instruction. Contrary to petitioner's contention (Pet. 5-7), the district court did not fail to instruct on a statutory element, nor did it fail to require the jury to determine whether that element had been proved. To the contrary, the district court specifically instructed the jury that the use of an explosive was an essential element of the offense set forth under 18 U.S.C. 844(i) and that the government was required to establish each element by proof beyond a reasonable doubt (Tr. 2265-2266). The court also gave the following complete and accurate definition of the word "explosive," as that term is used in the statute (Tr. 2263-2264):

> For the purpose of this statute, the term "explosive" means gun powders, powder used for blasting, all forms of high explosives, blasting material, fuses, other than electrical circuit breakers, detonators, and other detonating agents, smokeless powders, and also includes other explosive or incendiary devices as defined within the meaning of another statute, that is Title 18, section 232 of the United States Code, in the following manner: dynamite and all other forms of high explosives, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container, including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one individual acting alone.

> Furthermore, "explosive," under section 844(i), encompasses any chemical compound, mechanical mixture or device which contains any oxidizing or combustible units or other ingredients which, in such proportions, quantities or packing, that ignition by fire, or friction, by concussion, by percussion, or by detonation of the compound, mixture, device or any part thereof, may cause an explosion.
>
> The term "explosive or incendiary device" means incendiary bomb, grenade, fire bomb, or similar device.

The error in the court's instruction occurred at the conclusion of this lengthy definition when it added (Tr. 2264) that an "[i]ncendiary device is any article, substance, or combination of articles or substances capable of generating fire in a combustible material." It was this final sentence that the court of appeals noted (Pet. App. 2g) "was broad enough to allow even a common match to be held an 'incendiary device.' " But the court of appeals further concluded that in view of the surrounding instructions[3] and the specific facts of this case the jury hardly could have been misled by this concluding phrase. The court noted (*ibid.*) that the device used — gasoline-filled, paper wrapped cans with holes punched in the tops — were wholly unlike matches and clearly came within the boundaries of the statute and the district court's otherwise correct definition of "explosive." In these circumstances, the court concluded (Pet. App. 2g-2h), it was "highly unlikely that the jury could have reached its finding that the device in question constituted an explosive under the statute by a simplistic analogy to a mere match." This is particularly true where the

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[3]The court previously had instructed the jury (Tr. 2247) that it was "not to single out any one instruction alone as stating the law, but must consider the instructions as a whole."

prosecutor argued (Tr. 2045) that the cans that started the October 1st fire were incendiary devices within the meaning of the statute and where petitioner defended on the theory that someone else probably set the fires because he had no motive to do so (Tr. 2110-2112).

This case is thus wholly unlike those in which an instruction that has already been condemned as likely to mislead the jury and, in effect, to direct a verdict on an essential element of the offense, is assessed for harmlessness. As we noted above, the challenged instruction in this case, if relied on by the jury, would not have removed an essential element from the jury's consideration nor have directed a verdict against the defendant on that issue.[4] Rather, the error consisted of an overbroad definition of one element of the offense, which included a means of destruction beyond the scope of the statute. Moreover, the court of appeals was clearly correct in finding that this overbroad definition could not have figured in the jury's verdict. Cf. *United States* v. *Kroesser*, 731 F.2d 1509, 1518 (11th Cir. 1984) (erroneous instruction on statutory element harmless in

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[4]The cases cited by petitioner (Pet. 4) as conflicting with the decision below thus are inapposite. *United States* v. *Crowder*, 719 F.2d 166 (6th Cir.), cert. denied, No. 83-5869 (May 14, 1984), *Engle* v. *Koehler*, 707 F.2d 241, 246 (6th Cir. 1983), aff'd by an equally divided Court, No. 83-1 (Mar. 26, 1984), and *Conway* v. *Anderson*, 698 F.2d 282, 284-286 (6th Cir.), cert. denied, No. 82-6594 (June 13, 1983), all dealt with *Sandstrom* errors. Indeed, in both *United States* v. *Crowder*, 719 F.2d at 172-173, and *Conway* v. *Anderson*, 698 F.2d at 284-286 (decided before *Connecticut* v. *Johnson*, *supra*), it was held that, in view of the particular nature of the defense, the giving of the *Sandstrom* instruction was harmless. Finally, in *United States* v. *Johnson*, 718 F.2d 1317 (5th Cir. 1983), the court of appeals held that the district court had erred in instructing the jury that a particular document was a "security" as a matter of law because that instruction removed an essential element of the offense of interstate transportation of a falsely made security (18 U.S.C. 2314) from the jury's consideration and thus directed a verdict on that issue.

view of overwhelming evidence of guilt); *United States* v. *Vaglica*, 720 F.2d 388, 390-391 (5th Cir. 1983) (inadequate instructions on the essential elements of the substantive crimes that constituted the objects of the charged conspiracies harmless where defense did not raise any issue concerning any element of the object offenses); *United States* v. *Herbert*, 698 F.2d 981, 987 (9th Cir. 1983), cert. denied, No. 82-1963 (Oct. 3, 1983) (instructional error permitting jury to convict of illegal possession of machine guns even though defendant had no knowledge that the legal-appearing weapons had been converted to automatic weapons harmless in the face of overwhelming evidence that the defendant knew the weapons were automatic and defended on the theories that he never possessed the weapons and had been entrapped).[5]

2. *a.* Petitioner next argues (Pet. 10-15) that the district court erroneously prohibited him from presenting evidence that someone else committed the crimes with which he was charged. Specifically, he claims (Pet. 10-12) that the district

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[5]Petitioner's additional argument (Pet. 8-10) that there was no evidence that the cans used in the October 1st fire were "explosives" within the meaning of the statute was correctly rejected by the court below (see Pet. App. 2d-2f). According to 18 U.S.C. 232(5)(C), which is incorporated into the definitional section of the statute, 18 U.S.C. 844(j), an incendiary device includes "any incendiary bomb or grenade, firebomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone." As the court of appeals found (Pet. App. 2e), the gasoline-filled cans wrapped in paper into the tops of which holes had been punched appeared to be a " 'similar device' which very closely parallel[led] the example set forth in the statute." The cans were the containers and the wicks consisted of the paper wrappings. We agree with the court of appeals (Pet. App. 2e-2f) that the fact that the cans would not break was of no significance because the holes punctured in the tops, from which the gas and flame would seek to escape, served the same purpose as a breakable container.

court erred in quashing his subpoena duces tecum to the City of Anchorage that sought production of reports regarding other alleged arsons. According to petitioner, these reports showed that petitioner's accusers — McDaniel and Green — might have started contemporaneous fires at other local bars. Petitioner therefore contends that these investigative reports were relevant evidence in support of his theory that he was not involved in McDaniel's and Green's burning of Bobby McGee's. The district court reviewed the requested documents in camera and quashed the subpoena.

Relying on Fed. R. Crim. P. 17(c),[6] the court of appeals correctly concluded that petitioner had failed to establish the relevance to his defense of the City's arson reports (Pet. App. 2j): "Appellants have not pointed to any substantial foundation for believing that the investigative reports would furnish defensive matter, or would even suggest that the fires charged in the indictment were probably set by others." Moreover, the court of appeals undertook its own independent review of the requested documents, which "support[ed] the trial court's finding that the incidents described in the arson reports were different in nature from those in this case, and gave no indication that others were involved" (Pet. App. 2j-2k). Finally, the court of appeals noted (*id.* at 2k) that petitioner had made no showing that the arson reports would have been admissible under Fed. R. Evid. 803(8)(B).[7]

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[6]Rule 17(c) provides in pertinent part that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

[7]Rule 803(8)(B) provides an exception to the hearsay rule for public records and reports setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel*" (emphasis added).

b. Petitioner also claims error (Pet. 13) in the district court's excision of portions of the FBI case agent's investigative report. The government submitted this report to the district court in camera pursuant to a defense request made under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. 3500. That court examined the report, excised the irrelevant portions and turned the remainder over to the defendants. Pet. App. 2k. Petitioner now claims (Pet. 13) that the district court excised "crucial portions" from the reports, which may have contained evidence supporting his theory that the owners of Bobby McGee's, not petitioner, hired McDaniel and Green to burn the restaurant. The court of appeals correctly rejected this argument as well.

Again, the court of appeals independently reviewed the report at issue (Pet. App. 2k) and agreed (*id.* at 2*l*) that the portions excised by the district court "contain[ed] no material exculpatory evidence and are either completely speculative or irrelevant to these proceedings." These fact-bound determinations by both courts below do not warrant this Court's review.

c. Moreover, contrary to petitioner's claim, the district court's refusal to allow discovery of the City's report and less than full access to the FBI case agent's report did not prevent him from presenting his theory of the case. To the contrary, petitioner's cross-examination of the fire inspector and of McDaniel and Green sought to elicit much of the information he claims was in the proffered reports. For example, under cross-examination Inspector Ludwig confirmed that McDaniel had been a suspect in other fires, including a fire at a "twelve-plex" (Tr. 174). Petitioner also cross-examined McDaniel and Green concerning their previous statements that McDaniel burned bars in order to obtain remodeling work (Tr. 453-456; see also Tr. 679-682), and that the owners of Bobby McGee's restaurant, rather

than petitioner, had hired them to burn down that bar because the business was losing money (Tr. 459, 682-685). Petitioner thus was not denied his right to cross-examination under *Davis* v. *Alaska*, 415 U.S. 308 (1974), in order to prove that someone else had committed the crimes with which he was charged; he was prevented only from discovering materials that both courts below had held would have been of no use to his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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